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108-342

IN THE

SUPREME COURT OF THE UNITED STATES.

W. H. ELLIS, MASTER, *et al.*,
vs.
ATLANTIC MUTUAL INS. CO., *et al.*
No. 239.

Brief for Appellees.

On February 24, 1878, the ship Tornado was lying in the Mississippi River, moored to her wharf at New Orleans, and bound on a voyage from that city to Liverpool.

The libellant, appellant in this case, was her master.

On the morning of that day, before she had broken ground for her voyage, the ship was discovered to be on fire.

At the time, her cargo consisted of 5,195 bales of cotton, of which 5,008 had been received on board of the ship. Of the residue, 164 bales were on the levee, and 23 bales had not yet arrived.

For all this cotton the master had given bills of lading for shipment to Liverpool.

Water was pumped into the ship to extinguish the fire, and the ship sunk to the bottom of the river.

While in this condition, on the 27th of February, she was libeled for salvage by the New Harbor Protection Co., and

on the same day, by virtue of a warrant of seizure issued on said libel, the marshal took possession of the ship and cargo.

On the following day she was pumped out and raised, and the cargo discharged.

On the 28 February, 1878, the proctor for the salvors, who had libeled the ship and cargo, filed in the district court a motion for the sale of the cargo. He represented that it was greatly damaged, being in an unfit condition to be sent to its destination.

An order was made directing a sale. (p. 38.)

Then an application was made by Ellis, the master, in which he represented that he was entitled to bond said ship and cargo, and asking that the decree of sale should be rescinded.

On March 6, 1878, after argument, the court ordered that the master be allowed to bond the ship and such of the cotton as was then stored and was in good order, amounting to 523 bales. The remainder of the cotton, which was damaged, was sold realizing $116,000.

On the 19 March, the underwriters of the cargo, to whom it had been abandoned as for a total loss, filed their claim, claiming all of the cargo as substituted owners.

The insurers on the freight also intervened, and in their libel announce their interest as such insurers. p. 14.

The master not having taken any steps to bond the 523 bales, a rule was issued to show cause why such right should not be rescinded, and the underwriters be allowed to bond the same.

This rule was heard, the master being represented by counsel, and was, by the court, *made absolute without opposition*. (p. 39.)

On the 30 March, 1878, the appellants, master and own-

ers of the ship, filed their intervening libel, in the suit of the New Harbor Protection Co., claiming £4,169 13*s* 1*d* for freight; also $14,278.26, "advanced and paid for the compressing and stowing said cargo in said vessel, and other expenses incident thereto, and the further sum of £198 7*s* 2*d* railroad charges, for which libellants have a lien on said cargo as well as the proceeds of sale."

The District Court, and, subsequently, the Circuit Court, Mr. Justice Woods, dismissed the libel.

The finding of facts is on p. 37.

The conclusion of law is "that the libellants have no lien for freight on said cargo of cotton, or the proceeds thereof in the registry of the court, or for the said sum of money advanced and paid by them for compressing and storing said cargo." (p. 40.)

From this decree the present appeal is taken.

The grounds on which recovery is sought are stated in the 5th paragraph of the libel: "That by virtue of the contract for carrying said cargo it was libellant's right, as well as their duty and desire, to dry, pick, and rebale so much of said cotton as migh require it, and which they aver could easily have been done to carry it to its destination, and earn said freight-money for carrying the same, but which they have been unabled to do, because they have been denied the right to bond the same, owing to opposition of libellants and the underwriters, and through whose intervention said cargo has been entirely taken away from said master, whereby and in consequence of which the whole and entire freight-money agreed on became due, and also the sum for compressing and stowing the cargo." (p. 2.)

The answer of the underwriters is found at page 27.

It avers that the cotton, with the exception of the 500 bales and 23 bales in the hands of the marshal, was so badly

damaged by fire and water and so liable to deterioration as to render a sale necessary at the port of injury.

It charges that the ship, being destroyed by fire, for all sea-going purposes, could not be repaired, having been condemned and abandoned to her underwriters, as was her voyage, by order of her owners.

It denies that any offer was made to repair the ship, or to enter upon the voyage.

As to the claim for expenses, it is alleged that, by the usage of trade, the owners of the ship had to bear the expenses, all of which were incident to loading their vessel, looking to the freight, when earned, for reimbursement. The libellants could not recover both the freight and the disbursements, all the items of which were outlays preparatory to commencing to earn freight—the rate of freight, by commercial usage, being always made sufficient in amount to cover such outlays made at the owner's risk and contingent upon the earning of freight.

The prayer is, that the claim of libellants should be rejected, and the property awarded to respondents. (p. 31.)

The court finds that all of the cotton taken from the ship was damaged by water and some of it by fire, except 326 bales which had been taken from the ship, before she sank, in an undamaged condition.

That in consequence of the fire on the ship, it was so badly damaged that the cost of her repairs would exceed her value when repaired; that she was unseaworthy and incapable of earning freight.

All of the damaged cotton taken from the ship was unmerchantable cotton, even after it had been picked, dried, and rebaled—that is, could not be used for making cotton cloth, but could only be used for making felt hats, paper, wadding, and such like articles, having lost by the submer-

sion and drying a large part of its natural oil, its fibre being injured and its weight reduced. (pp. 37–41.)

By the Law Maritime, chance, or some other notorious necessity will excuse the master. But then he looseth his freight till such time as he breaks ground.

Molloy, Lib., 2, C. 4, S. 3.

In 1797 assumpsit was brought to recover freight. The case showed that the ship was bound for London, and had taken in her cargo; but before breaking ground was cut out of the port of lading by a French privateer, but after was recaptured and carried into another port of the same Island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters.

EYRE, CH. J.:

Held that the demand was neither warranted by the marine nor the common law; that the inception of freight is breaking ground. Further, if not entitled to freight, he has no claim to compensation for the expense of loading.

HEATH, J.:

The contract for freight is technical. By the marine law an inchoate right attaches from the ships breaking ground, and is consummated upon her arrival at the port of destination.

ROOKE, J.:

This is a new case. The contract in the bill of lading is for freight. The expression is, "they paying freight;" and though the master may have been at the expense of loading, yet as the voyage had not commenced, the plaintiff cannot demand a recompense. The text-writers all agree that freight commences from the breaking of ground. This is clear and intelligible. The ship begins to earn when she begins to move, and we cannot introduce new principles.

1 Bos. & Pul., 634, *Curling* vs. *Long*.

This case is cited, and the principle it announces repeated.

3 Kent's Com., marg. p. 224;
Maclachlan Mer. Ship, 455, 458;
Bailey vs. *Damon*, 3 Gray, 94.

In Parsons, on Ship. & Adm., it is said, referring to *Curling* vs. *Long*:

> "If the ship does not begin her voyage at all—does not break ground—no freight can be payable. But after the voyage has begun, and an interruption occurs, whatever be the delay it causes, if it occur from a peril of the sea, or by capture and recapture, embargo, or anything of the kind, if the vessel finally arrive, without avoidable delay, with the cargo, at the port of final destination, the whole freight is payable."
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> 1 Vol., p. 220.

Abbott, referring to the same case, thus states it:

> "As the right to freight does not commence until the ship has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board, if even without the fault of the master, the ship is prevented from actually setting forth on the voyage; and therefore, in the case of a ship which took on board cargo in Salt River, Jamaica, at great expense to the owners, and which actually cleared out for the voyage, but while waiting for convoy was cut out of the river by French privateers, and being afterwards retaken, was carried into Port Royal, where the cargo was sold under an order of the court of admiralty, and the proceeds thereof, with the deduction of salvage, paid to the merchants, although each of the judges expressly recognized the rule of the marine law as to the partition of freight *pro rata itineris*, the court holding that in this case there had been no commencement of the voyage, and therefore no freight could be due; and that as the freight was, by the contract, the only remuneration of all the services performed by the owners, they were not entitled to any recompense for the expense of taking the goods on board."
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> 12 London Ed., 1881, p. 391.

So in Massachusetts it is held—

"The rule as to what constitutes the commencement of the voyage is well settled. The voyage commences upon the breaking ground for the voyage and not before. Citing *Curling* vs. *Long*, *supra*; *Burgess* vs. *Gun*, 3 Har. & John., 225; Smith's Mercantile Law, 308."

Bailey vs. *Damon*, 3 Gray, 94.

Further citation on this subject is unnecessary.

It is the right or duty of the master, when his vessel is disabled in the *course of the voyage*, to procure another, if he can, and take on the cargo.

Smith's Mer. Law, p. 308.

So it is held that in the *course of the voyage* a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best, under the circumstances in which it may be placed; and that as a ~~conclusive~~ correlative right, he is entitled to charge the owners with the expenses properly incurred in so doing.

Abbott, p. 310.

This "right or duty" of the master it is seen only arises after the voyage has commenced.

No case has been produced, or can be produced, where this "right or duty" to reship has been sustained under the circumstances of this case.

It is insisted that the master had the right to bond the cargo so as to earn freight.

The findings show that the *Tornado* in consequence of the fire was unseaworthy and incapable of earning freight.

That the cotton, except 523 bales, as explained in No. 17, even after it had been packed an rebaled was unmerchantable. Nos. 16, 18.

The Court of Admiralty, at the instance of the salvors, had decreed the sale of the cotton.

Then the master filed his application to bond the ship and cargo, and averring that the order of sale was improvidently made, and that it worked great injury to him. A rule was entered that the libellant (Salvors) show cause why the said order should not be rescinded and the claimant permitted to bond the cargo. (p. 5.)

In this application to bond the object of the master is not stated—no right to reship the cotton is referred to by him, and no offer to do so.

On the hearing of this rule, and on consideration of the evidence taken thereon by order of the court, the damaged cotton was ordered to be sold, and the claimant allowed to bond that which was in good order. (p. 6.)

It is submitted that the court of admiralty, having the property rightfully in its possession, had full authority to determine what was best for all parties in interest.

In the case of the *Kathleen*—a cargo of cotton for Bremen—on collision in the British channel, the ship was abandoned. She was taken possession of by salvors and carried into Dover. The cargo was damaged by sea water. In the suit by the salvors, the court, without notice to the owners of the ship, ordered the cargo to be sold. The owners, hearing of the order and wishing to have the cargo transhipped and carried to the port of destination, applied to have the order rescinded and to give bond for the cargo.

The court, being of opinion that it was for the benefit of all the parties that the cargo should be sold, refused to rescind, but reserved the question of freight.

The contention on the part of the *Kathleen* was, that she could have earned freight by carrying the cargo to Bremen if the master had not been prevented by the intervention

† Sec. 941. R.S. bars an application to such an order.

of the owners of the cargo, and that full or pro-rata freight was due.

In decreeing against freight, Sir Robert Phillimore said:

> "It has been urged that the salvors have *only a lien* for their remuneration, and this is true. But it is also true they are in lawful possession, and cannot be displaced by the owners. When the salvage suit begins, the property is placed in the custody of the court, which is bound to do what is best for it."
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> 12 Eng. (Moak's Rep.), 645

In the language of Story, the possession of the property by the court, through its officers, is a possession protective of the interest of all concerned, and not displacing the rights or lien of any party. In such case the court considers itself bound as matter of duty to act *in rem for the benefit of all concerned.*

Again, touching the right of the master to bond the cargo, he says:

> "In cases of salvage, I do not know that the owners of the ship or cargo have, as a matter of right, any claim to have either of them delivered on bail at an appraisement, if either of them be perishable or may sustain injury from the delay of the salvage proceedings. A sale may be, and usually is, authorized by the court. But unless the salvors assent to a delivery on bail, it is not the usual practice of the court to direct a delivery on appraisement. The salvors have as strong a right to insist upon having their claim fixed by a sale."
>
> The Nathaniel Hooper, 5 Sumn, 553, 562.

Nor can a promise be implied to pay freight from the acceptance by the insurer of the salvage, or remains of the cargo, under the decree in this case.

The acceptance which lays upon the shipper the obligation to pay freight must be voluntary in substance and fact or no claim arises from it.

Parsons on Ship. & Adm., 1 Vol., 240.

The claim now asserted is: that the court should decree to the master "the whole and entire freight-money agreed on for carrying said cargo forward, amounting to £4,169, as also the sum of $14,278 for stowing the cargo."

This demand is made in a case where the owners of the cargo have been subjected to a severe loss by a disaster to the ship before she had completed her loading and was ready to commence her voyage.

If such a claim has ever received judicial recognition, the research of the appellant has not (in his brief) enabled him to refer to the case.

Judge STORY, speaking of the cases in which the whole freight can be claimed, says:

> "The whole of the cases in which the full freight is due, notwithstanding the non-arrival of the goods at the port of destination, *may be reduced to the single statement*, that the non-arrival has been occasioned by no default or inability of the carrier-ship, but has been occasioned by the default or waiver of the merchant shipper."
>
> The Nathaniel Hooper, 553.

We submit that the findings of the court fully justify the decree dismissing the libel.

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J. McCONNELL,
W. HALLETT PHILLIPS,
For Appellees.